Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-01-166 OF 1996 CONSOLIDATED WITH CIVIL APPEAL NOS W-01-165 OF 1996 AND W-02-341 OF 1996
GOPAL SRI RAM, AHMAD FAIRUZ AND MOKHTAR SIDIN JJCA
6 MARCH AND 14 JUNE 1997

Constitutional Law *— Legislature — Power of Federal Parliament — Whether Parliament can make law concerning the environment in relation to land and river in Sarawak — Whether Sarawak Legislative Assembly had exclusive authority — Whether 'environment' is a separate legislative subject — Application of Legislative Lists in Ninth Schedule of the Federal Constitution*

Public Authorities *— Environmental protection — Whether Environmental Quality Act 1974 applies in Sarawak — Whether Director General of Environmental Quality may make order in relation to Sarawak — Whether Director General required to supply copies of environmental impact assessment report to public — Whether there was breach of procedural fairness in failure to supply copies*

Administrative Law *— Remedies — Declaration — Validity of subsidiary legislation — Whether applicants had locus standi to make application — Whether application was an attempt to enforce a penal sanction — Whether applicants suffered special injury*

Statutory Interpretation *— Construction of statutes — Federal and state legislation — How scope of Federal and state legislation on a particular subject should be determined — Reference to enumerated powers doctrine*

All three appeals arose from a judgment of the High Court and concerned the same subject matter. The respondents' complaint related to the Bakun Hydroelectric Project ('the project') which Ekran Bhd was in the process of constructing near Belaga in the Kapit Division of the State of Sarawak. The whole of the affected area belonged to the State of Sarawak, though about 10,000 natives were in occupation of it under customary rights. The respondents were three such natives and they and their ancestors had, from time immemorial, lived upon and cultivated the land in question. While the project would deprive them of their livelihood and their way of life, all those affected by the project would be resettled by the state government and their customary rights would be extinguished in accordance with the Land Code (Sarawak Cap 81). In the High Court, the respondents applied for declarations that the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order 1995 ('the Amendment Order') was invalid and that before Ekran Bhd carried out the project, it had to comply with the Environmental Quality Act 1974 ('the EQA'). The Amendment Order had retrospectively excluded the operation of the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 ('the 1987 Order') to Sarawak. The respondents contended that the project was governed by the EQA

and the 1987 Order. They complained that they were not given a copy of the environment impact assessment report on the project and had been deprived of procedural fairness in that they were not given an opportunity to make representations in respect of the impact which the project would have upon the environment, before the decision to implement the project was made. The High Court granted the declarations (see [1996] 2 MLJ 388).

The Director General of Environmental Quality, the Government of Malaysia, the Natural Resources and Environment Board of Sarawak, the Government of Sarawak and Ekran Bhd appealed. The appellants argued that although the EQA was expressed to apply throughout Malaysia, it did not extend to the project because the land in question belonged to the State of Sarawak, with respect to which Parliament had no legislative authority. In fact, Sarawak had its own environmental law in the Natural Resources Ordinance 1949 ('the Ordinance'). Article 74 of the Federal Constitution read together with the Ninth Schedule placed land as a legislative subject in the State List. 'Environment' was not specified as a separate legislative subject because it was a multi-dimensional concept that was incapable of having any independent existence. The appellants contended that since the project was in respect of land and a river that were wholly within Sarawak, it was the Ordinance and not the EQA that applied. Since the EQA did not apply to the project, the respondents had no vested rights in the matter of procedural fairness and had not been deprived of such rights by the Amendment Order. The issues to be decided in these appeals were: (a) whether the EQA applied to the project; and (b) whether the respondents had locus standi to bring this action.

Held, allowing the appeals:

(1) (Per **Gopal Sri Ram** and **Mokhtar Sidin JJCA**) Courts should, when determining the scope of Federal and state legislation upon a particular subject, ensure that the enactments of each legislative power were read so as to avoid inconsistency or repugnancy between them. While both Parliament and the Sarawak Legislative Assembly had concurrent power to make law regulating the production, supply and distribution of power, since the 'environment' in question, by reason of item 2(a) of List II and item 13 of List IIIA of Sch 9 to the Federal Constitution, lay wholly within the legislative and constitutional province of the State of Sarawak, that state had exclusive authority to regulate, by legislation, the use of it in such manner as it deemed fit. The EQA thus did not apply to the environment that was the subject matter of this case and the respondents had no vested or other interest under the EQA upon which the Amendment Order could have any effect (see pp 38E, I and 39A, E); *State of Bombay v Narottamdas Jethabhai* AIR 1951 SC 69, *JC Waghmare & Ors v State of Maharashtra* AIR 1978 Bom 119, *PP v Datuk Harun*

A *bin Hj Idris & Ors* [1976] 2 MLJ 116 and *Commonwealth of Australia & Anor v State of Tasmania & Ors* (1983) 158 CLR 1 followed.

(2) (Per **Gopal Sri Ram** and **Mokhtar Sidin JJCA**) In any event, the respondents lacked substantive locus standi, and the relief B sought should have been denied because: (a) the respondents were, in substance, attempting to enforce a penal sanction. This was a matter entirely reserved by the Federal Constitution to the Attorney General of Malaysia in whom resided the unquestionable discretion whether to institute criminal proceedings; (b) the C complaints advanced by the respondents amounted to deprivation of their lives under art 5(1) of the Federal Constitution. Since such deprivation was in accordance with the law, ie the Land Code (Sarawak Cap 81), they had on the totality of the evidence suffered no injury and there was thus no necessity for a remedy; (c) there were persons, apart from the respondents, who were D adversely affected by the project. There was no special injury suffered by the respondents over and above the injury common to others. The action commenced by the respondents was not representative in character and the other affected persons were not before the court; and (d) the judge did not take into account E relevant considerations when deciding whether to grant declaratory relief. In particular, he did not have sufficient regard to public interest. Additionally, he did not consider the interests of justice from the point of view of both the appellants and the respondents (see p 47C–G); *Government of Malaysia v Lim Kit* F *Siang* [1988] 2 MLJ 12 and *Tan Sri Hj Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 followed.

(3) (Per **Mokhtar Sidin JCA**) Under the Ordinance, which was the legislation applicable in this case, there was no requirement for the respondents to be supplied with copies of the environmental impact assessment report. As such the respondents had no cause G of action in this appeal. Even if s 34A of the EQA applied, the respondents would only be given copies of the report if they had asked for it. There was no accrued right that the report must be distributed to the public without the public asking for it (see pp 55F–I, 56A–I and 57A).

H

Per curiam:

(Per **Gopal Sri Ram JCA**) When our courts come to decide whether to grant standing to apply for a declaration in public law in a particular case, they must be extremely cautious in applying decisions of courts I of other countries because the reasons for granting or refusing standing in those other jurisdictions may depend upon the economic, political and cultural needs and background of individual societies within which the particular court functions (see p 40E–G).

[Bahasa Malaysia summary

Ketiga-tiga rayuan berbangkit daripada suatu penghakiman Mahkamah Tinggi dan adalah berhubung dengan isi perkara yang sama. Aduan penentang-penentang berkaitan dengan Projek Hidroelektrik Bakun ('projek tersebut') yang mana Ekran Bhd sedang dalam proses membina dekat Belaga dalam bahagian Kapit di negeri Sarawak. Keseluruhan kawasan yang terlibat dimiliki oleh negeri Sarawak, walaupun kira-kira 10,000 anak negeri mendudukinya di bawah hak kelaziman. Penentang-penentang adalah tiga daripada anak negeri dan mereka serta nenek moyang mereka telah hidup dan mengusahakan tanah berkenaan sejak dahulu lagi. Manakala projek tersebut akan melucutkan mata pencarian dan cara kehidupan mereka, semua yang terjejas oleh projek tersebut akan ditempatkan semula oleh kerajaan negeri dan hak kelaziman mereka akan dilenyapkan menurut Kanun Tanah (Sarawak Bab 81). Di Mahkamah Tinggi, penentang-penentang memohon deklarasi bahawa Perintah Kualiti Alam Sekeliling (Aktiviti yang Ditetapkan) (Penilaian Kesan kepada Alam Sekeliling) (Pindaan) 1995 ('Perintah Pindaan') adalah tidak sah dan bahawa sebelum Ekran Bhd melaksanakan projek tersebut, ia mestilah mematuhi Akta Kualiti Alam Sekeliling 1974 ('AKAS'). Perintah Pindaan telah mengecualikan operasi Perintah Kualiti Alam Sekeliling (Aktiviti yang Ditetapkan) (Penilaian Kesan kepada Alam Sekeliling) 1987 ('Perintah 1987') ke Sarawak secara kebelakangan. Penentang-penentang berhujah bahawa projek tersebut dikuasai oleh AKAS dan Perintah 1987. Mereka mengadu bahawa mereka tidak diberikan sesalinan laporan penilaian kesan kepada alam sekeliling mengenai projek tersebut dan telah dilucutkan keadilan prosedur dalam ertikata bahawa mereka tidak diberi peluang untuk membuat representasi berhubung dengan kesan projek tersebut terhadap alam sekeliling, sebelum keputusan untuk melaksanakan projek tersebut dibuat. Mahkamah Tinggi membenarkan deklarasi (lihat [1996] 2 MLJ 388).

Ketua Pengarah Jabatan Alam Sekitar, Kerajaan Malaysia, Lembaga Sumber Asli dan Persekitaran Sarawak, Kerajaan Sarawak dan Ekran Bhd merayu. Perayu-perayu menghujahkan bahawa walaupun AKAS dinyatakan terpakai di seluruh Malaysia, ia tidak melanjut kepada projek tersebut kerana tanah berkenaan adalah kepunyaan Negeri Sarawak, yang mana Parlimen tidak mempunyai apa-apa kuasa perundangan ke atasnya. Pada hakikatnya, Sarawak mempunyai undang-undang alam sekitar sendiri dalam Ordinan Sumber Asli 1949 ('Ordinan tersebut'). Perkara 74 Perlembagaan Persekutuan dibaca bersama dengan Jadual Kesembilan meletakkan tanah sebagai suatu perkara perundangan dalam Senarai Negeri. 'Alam sekeliling' tidak dikhaskan sebagai suatu perkara perundangan yang berasingan kerana ia adalah suatu konsep multi-dimensi yang tidak berupaya mempunyai sebarang kewujudan bebas. Perayu-perayu berhujah bahawa memandangkan projek tersebut adalah berkaitan dengan tanah dan sungai di negeri Sarawak, Ordinan tersebut adalah terpakai dan bukannya AKAS. Oleh kerana AKAS tidak terpakai kepada projek tersebut, penentang-penentang tidak mempunyai hak kukuh dalam

perkara keadilan prosedur dan tidak dilucuthak mereka oleh Perintah Pindaan. Isu-isu untuk diputuskan dalam rayuan-rayuan ini ialah sama ada: (a) AKAS terpakai kepada projek tersebut; dan (b) penentang-penentang mempunyai locus standi untuk membawa tindakan ini.

Diputuskan, membenarkan rayuan-rayuan:

(1) (Oleh **Gopal Sri Ram** dan **Mokhtar Sidin HHMR**) Mahkamah-mahkamah haruslah memastikan bahawa penggubalan setiap kuasa perundangan dibaca supaya mengelak ketidaktekalan atau percanggahan antara mereka ketika menentukan skop perundangan Persekutuan dan negeri atas suatu perkara tertentu. Sedangkan kedua-dua Parlimen dan Dewan Undangan Sarawak mempunyai kuasa sejajar untuk membuat undang-undang yang menguasai penghasilan, pembekalan dan pengagihan kuasa, oleh kerana 'alam sekeliling' berkenaan, disebabkan butir 2(a) Senarai II dan butir 13 Senarai IIIA Jadual 9 Perlembagaan Persekutuan, terletak sepenuhnya dalam perundangan dan perlembagaan negeri Sarawak, negeri itu mempunyai kuasa eksklusif untuk mengawal kegunaan dalam apa cara yang difikirkannya wajar melalui perundangan. Justeru itu, AKAS tidak terpakai kepada alam sekeliling yang merupakan isi perkara kes ini dan penentang-penentang tidak mempunyai apa-apa kepentingan kukuh atau kepentingan lain di bawah AKAS atas mana Perintah Pindaan boleh mempunyai apa-apa kesan (lihat ms 38E, I dan 39A, E); *State of Bombay v Narottamdas Jethabhai* AIR 1951 SC 69, *JC Waghmare & Ors v State of Maharashtra* AIR 1978 Bom 119, *PP v Datuk Harun bin Hj Idris & Ors* [1976] 2 MLJ 116 dan *Commonwealth of Australia & Anor v State of Tasmania & Ors* (1983) 158 CLR 1 diikut.

(2) (Oleh **Gopal Sri Ram** dan **Mokhtar Sidin HHMR**) Walau bagaimanapun, penentang-penentang kekurangan locus standi yang substantif, dan relief yang diminta sepatutnya telah ditolak kerana: (a) penentang-penentang cuba menguatkuasakan sanksi penal. Ini merupakan suatu perkara yang dikhaskan sepenuhnya oleh Kerajaan Persekutuan kepada Peguam Negara Malaysia yang mempunyai budi bicara yang tidak boleh dipersoalkan sama ada untuk memulakan prosiding jenayah; (b) aduan yang dikemukakan oleh penentang-penentang sama seperti perlucutan hidup mereka di bawah perkara 5(1) Perlembagaan Persekutuan. Oleh kerana perlucutan demikian adalah menurut undang-undang, iaitu Kanun Tanah (Sarawak Bab 81), mereka telah tidak mengalami apa-apa kecederaan pada keseluruhan keterangan dan justeru itu tiada keperluan untuk remedi; (c) terdapat orang selain daripada penentang-penentang yang terjejas oleh projek tersebut. Tiada kecederaan istimewa yang dialami oleh penentang-penentang melampaui kecederaan yang biasa kepada orang lain. Tindakan yang dimulakan oleh penentang-penentang bukanlah berjenis berpewakilan dan orang lain yang terjejas tidak menghadapi mahkamah; dan (d) hakim tidak mengambil kira

pertimbangan relevan sewaktu memutuskan sama ada untuk memberikan relief deklarasi. Khususnya, beliau tidak mengambil kira kepentingan awam dengan secukupnya. Tambahan pula, beliau tidak mempertimbangkan kepentingan keadilan dari segi kedua-dua perayu-perayu dan penentang-penentang (lihat ms 47C–G); *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 dan *Tan Sri Hj Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 diikut.

(3) (Oleh **Mokhtar Sidin HMR**) Di bawah Ordinan tersebut, yang mana adalah perundangan yang terpakai dalam kes ini, tiada keperluan untuk penentang-penentang dibekalkan dengan salinan laporan penilaian kesan kepada alam sekeliling. Oleh yang demikian, penentang-penentang tidak mempunyai kausa tindakan dalam rayuan ini. Jika pun s 34A AKAS terpakai, penentang-penentang hanya akan diberikan salinan laporan jika mereka telah memintanya. Tiada hak terakru bahawa laporan tersebut mestilah diedarkan kepada masyarakat awam tanpa diminta (lihat ms 55F–I, 56A–I dan 57A).

Per curiam:

(Oleh **Gopal Sri Ram HMR**) Apabila mahkamah kita perlu memutuskan sama ada untuk memberikan kebenaran untuk memohon deklarasi dalam undang-undang awam dalam suatu kes tertentu, mereka mestilah berwaspada dalam memakai keputusan mahkamah negara lain kerana alasan untuk memberikan atau menolak kebenaran dalam bidang kuasa lain itu boleh bergantung kepada keperluan ekonomik, politik dan budaya dan latar belakang masyarakat individu dalam mana mahkamah tertentu itu berfungsi (lihat ms 40E–G).]

Notes

For cases on the Legislature, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 983–1013.

For cases on public authorities, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1381–1462.

For cases on the declaration, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 236–292.

For cases on construction of statutes, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1454–1578.

Cases referred to

Bank of New South Wales v The Commonwealth (1948) 76 CLR 1 (refd)

Central Provinces & Berar Sales of Motor Spirit & Lubricants Taxation Act, Re 1938 AIR 1939 FC 1 (refd)

Commonwealth of Australia & Anor v State of Tasmania & Ors (1983) 158 CLR 1 (folld)

Director of Public Works v Ho Po Sang & Ors [1961] 2 All ER 721 (refd)

A *Flast v Cohen* (1968) 392 US 83 (refd)
Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12 (folld)
Ibeneweka v Egbuna [1964] 1 WLR 219 (refd)
JC Waghmare & Ors v State of Maharashtra AIR 1978 Bom 119 (folld)
Kong Chung Siew & Ors v Ngui Kwong Yaw & Ors [1992] 4 CLJ 2013 (refd)
B *Kajing Tubek & Ors v Ekran Bhd & Ors* [1996] 2 MLJ 388 (overd)
Mamat bin Daud & Ors v Government of Malaysia [1988] 1 MLJ 119 (refd)
PP v Datuk Harun bin Hj Idris & Ors [1976] 2 MLJ 116 (folld)
State of Bombay v Narottamdas Jethabhai AIR 1951 SC 69 (folld)
C *Tan Sri Hj Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 (folld)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261 (refd)
Valley Forge College v Americans United (1982) 454 US 464 (refd)

D **Legislation referred to**

Environmental Quality Act 1974 ss 1(1), 2, 34A
Environment Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 Schedule item 13(b)
Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order 1995
E Federal Constitution arts 4(4), 5(1), 8(1), 128, 73–77, 95B(1), Ninth Schedule
Land Code (Sarawak Cap 81)
Natural Resources Ordinance 1949 (Sarawak Cap 84) s 11A
Natural Resources and Environmental (Prescribed Activities) Order 1994
F

Appeal from: Originating Summons No S5–21–60 of 1995 (High Court, Kuala Lumpur)

Civil Appeal No W–01–166 of 1996

G *Gani Patail*, Senior Federal Counsel (*Nur Aini Zulkiflee*, Senior Federal Counsel and *Abu Bakar Jais*, Senior Federal Counsel with him) (Attorney General's Chambers) for the appellants.

Gurdial Singh Nijar (*Meenakshi Raman, M Thayalan* and *Jessica Binwani* with him) (*Meena Thayalan & Partners*) for the respondents.

H Civil Appeal No W–01–165 of 1996

JC Fong (State Attorney General) (Jabatan Peguam Besar Negeri Sarawak) for the appellants.

Gurdial Singh Nijar (*Meenakshi Raman, M Thayalan* and *Jessica Binwani* with him) (*Meena Thayalan & Partners*) for the respondents.

I Civil Appeal No W–02–341 of 1996

Muhammad Shafee Abdullah (*Oh Choong Ghee* and *Cheong Wee Wong* with him) (*Shafee & Co*) for the appellant.

Gurdial Singh Nijar (*Meenakshi Raman, M Thayalan* and *Jessica Binwani* with him) (*Meena Thayalan & Partners*) for the respondents.

6 March 1997

Gopal Sri Ram JCA:

Introduction

These three appeals were heard on 17 February 1997. At the conclusion of argument, they were allowed and certain consequential orders were made to which I will refer later in this judgment. A brief oral summary of the main grounds on which the decision of this court was based was also delivered. My written reasons for the decision arrived at now follow.

All three appeals arise from a single judgment of the High Court (see [1996] 2 MLJ 388) and concern the same subject matter. Although the appellants are different in each appeal, the respondents are common. For this reason, when the appeals were called on for hearing, it was decided with the consent of all counsel before the court to hear the appellant in each appeal and then to invite a response from counsel for the common respondents. The appeals were heard, not in the order in which they were filed, but according to what was perceived to be the logical sequence of the arguments raised by the parties in the court below. Accordingly, Dato' Gani Patail — Senior Federal Counsel who appeared for the appellants in Civil Appeal No 166/96 ('the first appeal') — was invited to make his address first, followed by Datuk JC Fong, the Attorney General for the State of Sarawak, who appeared for the appellants in Civil Appeal No 165/96 ('the second appeal') and En Muhammad Shafee Abdullah who appeared for the appellant in Civil Appeal No 341/96 ('the third appeal'). Encik Gurdial Singh Nijar of counsel for the respondents in all the three appeals then responded to the arguments advanced in each appeal.

The appellants in the first appeal are the Director General of Environmental Quality and the Government of Malaysia respectively. The appellants in the second appeal are the Natural Resources and Environment Board of Sarawak and the Government of the State of Sarawak respectively. Ekran Bhd ('Ekran'), a public limited company, is the appellant in the third appeal.

The background

All the appellants in these appeals were defendants to an originating summons taken out by the respondents, as plaintiffs, in the court below. By the summons, as later amended, the respondents claimed the following relief:

(1) a declaration that the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order 1995 is invalid;

(2) a declaration that before the first defendant [Ekran] carries out the prescribed activity, viz the construction of the Bakun Hydroelectric Project, the first defendant has to comply with the Environmental Quality Act 1974, including s 34A of the said Act and/or the guidelines prescribed by the second defendant [the Director General] under s 34A of the said Act, and the Regulations made thereunder;

(3) costs of this application be borne by the defendants; and

(4) any other relief as deemed fit by this honourable court.

A The learned judge who heard the summons granted the first and second declarations. He also made an order for costs in the respondents' favour. The instant appeals are directed against his decision. The judgment of the learned judge has been reported: see *Kajing Tubek & Ors v Ekran Bhd & Ors* [1996] 2 MLJ 388. The thoroughness with which he has dealt B with the facts and chronology of events and the history of the relevant legislation makes it unnecessary for me to regurgitate these. I therefore propose to confine myself to only so much of the salient features of the case as I consider essential to these appeals.

The respondents' complaint relates to the Bakun Hydroelectric Project ('the project') which Ekran is in the process of constructing near Belaga in C the Kapit Division of the State of Sarawak. The project involves the inundation of a very large tract of land, the creation of a reservoir and a water catchment area. The whole of the affected area belongs to the State of Sarawak. As to this, there is no dispute.

Although ownership of the land is by law vested in the State of D Sarawak, about 10,000 natives are in occupation of it under customary rights. The respondents are three such natives from the longhouses in Belaga, Uma Daro and Batu Kalo respectively. They and their ancestors have, from time immemorial, lived upon and cultivated the land in question. It is common ground that the project will deprive them of their livelihood and their way of life. However, it is also common ground that all those E affected by the project will be resettled by the state government. Their ancestral and customary rights will be extinguished in accordance with the Land Code of Sarawak (Sarawak Cap 81). In other words, the state government of Sarawak seeks to deprive the livelihood and way of life of all those affected by the project in accordance with the provisions of *existing* F written law obtaining in the state.

The arguments of counsel

The respondents' case, as presented to the trial judge and agitated before this court, rests upon the argument that the project comes squarely within G the purview of, and is governed by, the provisions of the Environmental Quality Act 1974 ('the EQA') read with the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 ('the 1987 Order') made under the EQA and taking effect from 1 April 1988. The core of the respondents' complaint is that they were not given a copy of the environment impact assessment report on the project and H had been deprived of procedural fairness in that they were not given an opportunity to make representations — what counsel referred to as the respondents' input — in respect of the impact which the project would have upon the environment, before the decision to implement the project was made. Although Sarawak has its own environmental law in the form of I the Natural Resources Ordinance 1949 ('the Ordinance'), the appellants were under an obligation to have regard to the more stringent requirements of the EQA. In the circumstances, the respondents had both threshold as well as substantive locus standi to claim and obtain the relief in question. Additionally, on 20 April 1995, being the very day on which the summons was filed, the Director General and the Government of Malaysia (the

appellants in the first appeal), for the purpose of cutting the very ground from under the respondents' feet, published in the *Gazette*, the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order 1995 ('the Amendment Order'), retrospectively excluding the operation of the 1987 Order to Sarawak. Since s 34A of the EQA does not authorize the making of retrospective orders, the Amendment Order was wholly invalid. In any event, the respondents had a vested right under the EQA to receive procedural fairness so that the Amendment Order could not operate retrospectively to terminate that right.

So much for the respondents' submissions, all of which found favour with the learned judge. I shall now set out, in summary, the arguments advanced on behalf of each appellant.

The learned Senior Federal Counsel who appeared for the appellants in the first appeal, but not before the High Court, argued that although the EQA, by s 2 thereof, is expressed to apply throughout Malaysia, it does not extend to the instant activity, namely, the project, because the land in question belongs to the State of Sarawak, with respect to which Parliament has no legislative authority. The enumerated powers doctrine, one of the fundamental features of a Federal system of Government, which is housed in art 74 of the Federal Constitution, read with the Ninth Schedule wherein appear the respective Legislative Lists, places land as a legislative subject in the State List. Nowhere in the three Lists — the Federal, the State and the Concurrent — is 'environment' specified as a separate legislative subject. This is because the expression 'environment' is a multi-dimensional concept that is incapable of having any independent existence. It is a concept that must attach or relate itself to some physical geographic feature, such as land, water or air, or to a combination of one or more of these, or to all of them. Any impact upon the 'environment' must, in the present context, relate to or be in respect of some activity that is connected with and having an adverse effect upon either land, or water, or the atmosphere or a combination of them. Since the project is an activity that is in respect of land and a river that are wholly within the State of Sarawak, it is the Ordinance and not the EQA that governs the legal position. Parliament must be presumed not to have intended to encroach upon the legislative powers of the State of Sarawak when it enacted the EQA. Neither did the Executive intend any such encroachment when the 1987 Order was made. Indeed, it was to make matters absolutely clear that the Amendment Order was made and published. Whether it is the Act or the Ordinance that applies to a particular activity within the State of Sarawak depends upon the facts of each case. Thus, if an activity even within Sarawak has an impact upon land or a building within Federal authority, then it will be the Act and not the Ordinance that will apply. Since the EQA does not apply to the project, the respondents had no vested rights in the matter of procedural fairness. No question therefore arises of the deprivation of any such vested right by reason of the Amendment Order.

A Datuk Fong, while adopting the arguments advanced in support of the first appeal, submitted that the respondents lacked substantive locus standi in the matter. This is not a representative action. There are issues of public and national interest which the judge was aware of but did not take into account when he came to exercise his discretion when deciding whether the relief claimed ought to be granted. The respondents also B lacked substantive locus standi as they had suffered no injury in law. Although their fundamental right may have been adversely affected, the respondents were being compensated in accordance with written law. Whether the compensatory measures adopted were fair is a matter that must be dealt with elsewhere. Yet further, the learned judge did not C appreciate the issue that lay at the heart of the case, namely, whether the EQA applied to the project. Instead, he fell into error by treating the Amendment Order as forming the core of the case. In all the circumstances of the case, the respondents ought not to have been granted the relief claimed.

Encik Shafee, apart from adopting the arguments advanced by the D other appellants, drew attention to the fact that what the respondents were, in essence, seeking was the enforcement of a penal law against Ekran. The litigation, in so far as Ekran was concerned, was a private law action brought to enforce a penal law against it. The respondents therefore lacked the requisite locus standi to obtain the relief claimed.

E *The issues*

I do not propose to deal in seriatim with each of the foregoing submissions. Instead, I find it convenient to consider them in relation to the two main issues that they raise. These are as follows:

F (1) Whether the EQA applies to the project.

(2) Whether the respondents have locus standi in point of relief.

The first issue: applicability of the EQA to the project

In my judgment, the resolution of the first issue is determinative of the G respondents' claim for relief. For if the EQA does not apply to the project, then no question of deprivation of procedural fairness can possibly arise on the facts of the present case as the complaint relating to that deprivation is founded upon the applicability of the EQA. Neither can any complaint arise in respect of the Amendment Order. For if there was no vested right to receive procedural fairness, it is of pure academic interest that the H Amendment Order was retrospective in effect.

The respondents' argument that the EQA does indeed apply to the project is based on two matters. First, the EQA itself declares that it applies throughout Malaysia. Since the project is to be carried out within Malaysia and is one of the activities prescribed by the 1987 Order, the I EQA must be complied with by Ekran. Second, it was assumed by all concerned that the EQA does apply to the project. There was no suggestion at the hearing before the judge that the EQA did not apply for the reasons that were advanced before this court.

Taking the second prong of En Gurdial Singh's argument, the short answer to it lies in the recognition of the principle fundamental to our system of public law adjudication that the application of an Act of Parliament to a given fact pattern is a question for the court to decide. An erroneous assumption that an Act of Parliament applies to a particular situation, however strongly entertained, and however bona fide, does not bind anyone. Were it otherwise, persons who singularly lack the power to interpret Acts of Parliament may thwart legislative intention by privately treating an Act as being applicable to circumstances to which it does not bear the remotest connection.

The power to interpret all written law and to declare the law upon a particular subject that is raised as a dispute requiring curial determination has been entrusted by the framers of the Federal Constitution to the courts. The proposition at hand is central to the doctrine of separation of powers that is enshrined in the Federal Constitution, forming part of its basic fabric, and no countenance may be had at any attempt to truncate so fundamental a principle of our constitutional law.

Dato' Gani Patail's submission on the non-applicability of the EQA is based upon this fundamental proposition. The second ground advanced by En Gurdial Singh in support of his contention that the EQA applies in the present instance therefore lacks singular merit. I entertain no difficulty in rejecting it.

I now turn to the first and more substantial ground that forms the axis of the dispute between the parties to these appeals. To properly appreciate the rival contentions advanced by counsel, it is necessary to hearken to the relevant provisions of the EQA and the terms of the 1987 Order.

Section 1(1) of the EQA declares as follows:

> (1) This Act may be cited as the Environmental Quality Act 1974 and shall apply to the whole of Malaysia.

Section 34A makes the following provisions:

> (1) The Minister, after consultation with the Council, may by order prescribe any activity which may have significant environmental impact as prescribed activity.
>
> (2) Any person intending to carry out any of the prescribed activities shall, before any approval for the carrying out of such activity is granted by the relevant approving authority, submit a report to the Director General. The report shall be in accordance with the guidelines prescribed by the Director General and shall contain an assessment of the impact such activity will have or is likely to have on the environment and the proposed measures that shall be undertaken to prevent, reduce or control the adverse impact on the environment.
>
> (3) If the Director General on examining the report and after making such inquiries as he considers necessary, is of the opinion that the report satisfies the requirements of subsection (2) and that the measures to be undertaken to prevent, reduce or control the adverse impact on the environment are adequate, he shall approve the report, with or without conditions attached thereto, and shall

A inform the person intending to carry out the prescribed activity and the relevant approving authorities accordingly.

(4) If the Director General, on examining the report and after making such inquiries as he considers necessary, is of the opinion that the report does not satisfy the requirements of subsection (2) or that the measures to be undertaken to prevent, reduce or control the
B adverse impact on the environment are inadequate, he shall not approve the report and shall give his reasons therefor and shall inform the person intending to carry out the prescribed activity and the relevant approving authorities accordingly:

Provided that where such report is not approved, it shall not
C preclude such person from revising and resubmitting the revised report to the Director General for his approval.

(5) The Director General may if he considers it necessary require more than one report to be submitted to him for his approval.

(6) Any person intending to carry out a prescribed activity shall not carry out such activity until the report required under this section
D to be submitted to the Director General has been submitted and approved.

(7) If the Director General approves the report, the person carrying out the prescribed activities in the course of carrying out such activity, shall provide sufficient proof that the conditions attached to the report (if any) are being complied with and that the proposed
E measures to be taken to prevent, reduce or control the adverse impact on the environment are being incorporated into the design, construction and operation of the prescribed activity.

(8) Any person who contravenes this section shall be guilty of an offence and shall be liable to a fine not exceeding ten thousand
F ringgit or to imprisonment for a period not exceeding two years or to both and to a further fine of one thousand ringgit for every day that the offence is continued after a notice by the Director General requiring him to comply with the act specified therein has been served upon him.

G The 1987 Order, which came into force on 1 April 1988, contains a schedule that lists out 19 main activities that are designated as prescribed activities. Item 13 of the Schedule to the 1987 Order is entitled 'power generation and transmission'. Paragraph (b) thereof makes the following a prescribed activity:

H (b) Dams and hydroelectric power schemes with either or both of the following:

(i) dams over 15 metres high and ancillary structures covering a total area in excess of 40 hectares;

(ii) reservoirs with a surface area in excess of 400 hectares.

I It is, as earlier observed, the respondents' contention that by reason of s 1(1), the EQA applies to the State of Sarawak. It is also their argument that the project falls squarely within para 13(b) of the 1987 Order and is therefore a prescribed activity in respect of which the requirements of s 34A must be met.

In my judgment, the activity described in para 13(b) of the 1987 Order cannot exist in the abstract. Dams, hydroelectric power schemes, reservoirs and the like must exist on land, which of course, is part of the environment, as is the very air that we breathe. Admittedly, the land and river on which the project is to be carried out lie wholly within the State of Sarawak and are its domain. So, when the respondents speak about 'the environment' in this case, they are in fact referring to environment that wholly belongs to the State of Sarawak subject, of course, to those customary or other rights recognized by its laws.

This exemplifies, and proves accurate, the argument of Dato' Gani Patail that the term 'environment' is a multi-faceted and multi-dimensional concept, depending for its meaning upon the context of its use. So, there may be environment within the State of Sarawak which may fall outside its legitimate and constitutional control and within that of the Federal Government. It is to such limited cases that the EQA will apply.

The appellants' argument that the Ordinance co-exists with the EQA, each operating within its own sphere and without conflict, is based on the constitutional authority of the State of Sarawak to regulate, by legislation, the use of so much of the environment as falls within its domain.

The Federal Constitution, in order to lend expression to the federal system of government which we practise, has apportioned legislative power between the States and the Federation. Each legislative arm of government — the Legislative Assembly in the case of Sarawak and Parliament in the case of the Federation — is authorized by the Federal Constitution to make laws governing those subjects enumerated in the respective Lists appearing in the Ninth Schedule thereto. Constitutional lawyers term this as 'the enumerated powers doctrine'. It refers to the power of a legislature, whether State or Federal, to make laws upon topics enumerated in a written constitution. Generally speaking, if a particular subject in respect of which a law is enacted is not one of those enumerated in the enabling constitutional provision, the enacted law is ultra vires and therefore void: *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119. Proceedings to have a law invalidated on this ground — that is to say, the lack of legislative jurisdiction — must be brought in accordance with the terms of art 4(4) read with art 128 of the Federal Constitution.

The items in the respective Legislative Lists in the Ninth Schedule to the Federal Constitution relevant in the present context are:

(1) Item 2(a) in List II (the State List) which specifies 'land improvement' as a subject;

(2) Item 6(c), also in List II, which includes 'subject to the Federal List, water (including water supplies, rivers and canals)';

(3) Item 11(b) of List I (the Federal List) which enumerates:

> 11 Federal works and power, including —
>
> (a) ...
>
> (b) Water supplies, rivers and canals, except those wholly within one State ... '; and

(4) Item 13 of List IIIA (Supplement to Concurrent List for States of Sabah and Sarawak) which enumerates as a legislative subject:

> The production, distribution and supply of water power and of electricity generated by water power.

It is a well-settled principle of constitutional interpretation that every entry in each Legislative List must be given its widest significance and that its scope cannot be curtailed save to the extent necessary to give effect to other legislative entries: *State of Bombay v Narottamdas Jethabhai* AIR 1951 SC 69.

In *JC Waghmare & Ors v State of Maharashtra* AIR 1978 Bom 119 at p 137, Tulzapurkar Ag CJ, when delivering the judgment of a strongly constituted Full Bench of the Bombay High Court, after a review of the leading authorities upon the subject, summarized the applicable principles as follows:

> From the above discussion, the following general principles would be clearly deducible: (a) entries in the three Lists are merely legislative heads or fields of legislation; they demarcate the area over which the appropriate legislatures can operate; (b) allocation of subjects in the Lists is not by way of scientific or logical definition but is a mere enumeration of broad and comprehensive categories; dictionary meaning of the words used, though helpful, is not decisive; (c) entries should be interpreted broadly and liberally, widest amplitude being given to the words employed, because few words of an entry are intended to confer vast and plenary powers; (d) entries being heads of legislation, none of the items in the Lists is to be read in a narrow and restricted sense but should be read broadly so as to cover or extend to all cognate, subsidiary, ancillary or incidental matters, which can fairly and reasonably be said to be comprehended in it; (e) since the specific entries in the three Lists between them exhaust all conceivable subjects of legislation, every matter dealt with by an enactment should as far as possible be allocated to one or the other of the Entries in the Lists and the residuary Entry 97 in List I should be resorted to as the last refuge; and (f) if entries either from different Lists or from the same List overlap or appear to conflict with each other, every effort is to be made to reconcile and bring out harmony between them by recourse to known methods of reconciliation.

It is also well-settled that the phrase 'with respect to' appearing in art 74(1) and (2) of the Federal Constitution — the provision conferring legislative power upon the Federal and State Governments respectively — is an expression of wide import. As observed by Latham CJ in *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at p 186, in relation to the identical phrase appearing in s 51 of the Australian Constitution which confers Federal legislative authority:

> A power to make laws 'with respect to' a specific subject is as wide a legislative power as can be created. No form of words has been suggested which would give a wider power. The power conferred upon a Parliament by such words in an Imperial statute is plenary — as wide as that of the Imperial Parliament itself: *R v Burah* (1878) 3 App Cas 889; *Hodge v R* (1883) 9 App Cas 117. But the power is plenary only with respect to the specified subject.

Although Latham CJ was dissenting on that occasion, we are unable to see any criticism in the majority judgments in relation to what was said in the foregoing passage. Indeed, a reading of all the judgments in that case reveals that there was no disagreement between their Honours upon the applicable interpretative principles. Where the majority parted company with the learned Chief Justice was only with regard to the consequence that resulted on an application of those principles to the particular statute that was the subject of challenge.

There is yet another principle of constitutional law that is relevant to these appeals and upon which Dato' Gani Patail has relied. It is the presumption of constitutionality operating in favour of legislation passed by Parliament: see *PP v Datuk Harun bin Hj Idris & Ors* [1976] 2 MLJ 116 and *Commonwealth of Australia & Anor v State of Tasmania & Ors* (1983) 158 CLR 1. The essence of this presumption — a rebuttable one — is that Parliament does not intend to make laws that conflict with the provisions or the basic fabric of the Federal Constitution.

In the context of State and Federal relations as enshrined in the supreme law, Parliament is presumed not to encroach upon matters that are within the constitutional authority of a State within the Federation. The principle of interpretation that emerges in consequence is that courts should, when determining the scope of Federal and State legislation upon a particular subject, ensure that the enactments of each legislative power are read so as to avoid inconsistency or repugnancy between them. Thus, whenever a question arises as to whether it is a Federal or State enactment that should apply to a given set of facts, a harmonious result should, as far as possible, be aimed at, and:

> ... an endeavour must be made to solve it, as the Judicial Committee have said, by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions ... . (*Re The Central Provinces & Berar Sales of Motor Spirit & Lubricants Taxation Act* 1938 AIR 1939 FC 1, per Gwyer CJ at p 8.)

I digress for a moment to declare that I am entirely conscious of the role assigned to this court in the present case. This court is not pronouncing upon the validity or otherwise of a Federal or State law. That role has been specifically reserved by the supreme law to the Federal Court under art 128. What concerns this court in the present instance is merely a question of interpretation of the Federal Constitution in relation to the applicability of the EQA to Sarawak. All references to legislative competence in this judgment are therefore confined solely to this narrow issue.

Applying the settled principles of interpretation which I discussed a moment ago, it is plain that both Parliament and the Legislative Assembly of the State of Sarawak have concurrent power to make law regulating the production, supply and distribution of power. This, in my judgment, includes hydroelectric power. As pointed out to En Gurdial Singh during argument, the place where that power is to be generated is land and water. This, on the facts of the present case, is the 'environment' upon which the project will have an impact. Since the 'environment' in question, by reason

A of Item 2(a) of List II and Item 13 of List IIIA, lies wholly within the legislative and constitutional province of the State of Sarawak, that state has exclusive authority to regulate, by legislation, the use of it in such manner as it deems fit.

When properly construed, the EQA operates in entire harmony with B the Ordinance. In my judgment, Parliament, when it passed the EQA, did not intend — and could not have intended — to regulate so much of the environment as falls within the legislative jurisdiction of Sarawak.

I therefore agree with Dato' Gani Patail's submission that the Amendment Order was made and published, not for the purpose of C cutting the ground from under the feet of the respondents as suggested by their counsel, but for the purpose of making it abundantly clear to all concerned that the 1987 Order was not, for constitutional reasons, meant to apply to Sarawak.

The arguments raised by Dato' Gani Patail on the first issue have merit. They were indeed addressed to the learned judge who, meaning no D disrespect whatsoever to him, did not sufficiently appreciate them. There was therefore, in this respect, a serious misdirection of law on his part.

For the reasons I have thus far stated, the EQA, in my judgment, does not apply to the environment that is the subject matter of the instant case. It follows that the respondents had no vested or other interest under E the EQA upon which the Amendment Order could have any effect whatsoever. Both declarations ought therefore to have been refused.

It is part of the appellants' case — and this was dealt with by Datuk Fong when he argued the second appeal — that the learned judge failed to properly appreciate the critical point calling for determination. The F complaint here is that the learned judge treated the Amendment Order as the focal point of the case and considered all other points raised in relation to it. In this context, attention was drawn to the following passage in the judgment of the learned judge ([1996] 2 MLJ 388 at p 403):

> To begin with, this court wishes to reiterate that the issue before it is not G what is the appropriate legal measures to safeguard the environment; which seems to be the undertone of Mr Nijar's reply, and if allowed to proceed further would completely blur the relevant issues before this court. Basically, from the arguments and a scrutiny of the plaintiffs' application, the nucleus of the plaintiffs' challenge is on the validity of PU (A) 117/95 [the Amendment Order], in relation to the procedural aspect of its enactment. This does not involve the determination of the jurisdictional aspect between state legislation H and the Federal Parliament concerning who has the legislative power on various matters, either listed or not listed in the Ninth Schedule of the Federal Constitution.

I am in agreement with Datuk Fong that the correct starting point lies in the determination of the question: what is the environment that is in issue I in this case? Once that is done, then the law that is applicable may be readily discerned. If the environment that is being addressed, after due consideration of all the facts and circumstances of the case, is one that falls within the constitutional scope of the EQA, then it is that legislation which

would apply. This, in my judgment, is the logical approach to the question whether the EQA or some other state legislation applies in a given case. The approach adopted by the learned judge disregards the doctrine of federalism which is woven into the very fabric of the Federal Constitution. A

Since the learned judge, with respect, adopted the wrong approach to the case before him, his finding that the EQA applies to the project amounts to a serious misdirection. I am satisfied that this ground alone warrants a reversal of the judgment appealed from. But as it happens, there are other grounds as well, and it is to these that I now turn my attention. B

The second issue: locus standi

C

Before I address the finding made by the learned judge on this issue, it is necessary and desirable to make some introductory remarks upon the subject at hand.

Absent any statutory provision, locus standi — or standing to bring an action for a declaration in public law — is a matter of pure practice that is entirely for the courts to decide. Courts of some countries adopt a fairly lenient stance, while others insist on a stricter approach. In the United States, the pendulum of locus standi has swung from one extreme to another depending upon current judicial impression. Compare, for example, *Flast v Cohen* (1968) 392 US 83 with *Valley Forge College v Americans United* (1982) 454 US 464. D E

The choice appears to really depend upon the economic, political and cultural needs and background of individual societies within which the particular court functions. As these are not uniform in all countries, and fluctuate from time to time within the same country, views upon standing to sue in public law actions for declaratory or injunctive relief vary according to peculiar circumstances most suited to a particular national ethos. F

I make these introductory remarks to demonstrate what I consider to be a vital policy consideration. It is this. When our courts come to decide whether to grant standing to sue in a particular case, they must be extremely cautious in applying decisions of the courts of other countries because the reasons for granting or refusing standing in those other jurisdictions may depend upon the wider considerations to which I have referred in the preceding paragraph. G

In public law — and, in so far at least as the appellants in the first and second appeal are concerned, the summons in the present instance lies in public law — there are two kinds of locus standi. The first is the initial or threshold locus standi; the second is the substantive locus standi. H

Threshold locus standi refers to the right of a litigant to approach the court in relation to the facts which form the substratum of his complaint. It is usually tested upon an application by the defendant to have the action struck out on the ground that the plaintiff, even if all that he alleges is true, cannot seek redress in the courts. I

Although a litigant may have threshold locus standi in the sense discussed, he may, for substantive reasons, be disentitled to declaratory

A relief. This, then, is substantive locus standi. The factors that go to a denial of substantive locus standi are so numerous and wide ranging that it is inappropriate to attempt an effectual summary of them. Suffice to say that they range from the nature of the subject matter in respect of which curial intervention is sought to those settled principles on the basis of B which a court refuses declaratory or injunctive relief.

As regards subject matter, courts have — by the exercise of their interpretative jurisdiction — recognized that certain issues are, by their very nature, unsuitable for judicial examination. Matters of national security or of public interest, or the determination of relations between Malaysia and other countries as well as the exercise of the treaty making power are C illustrations of subject matter which is ill-suited for scrutiny by the courts. Jurisdiction is declined, either because the supreme law has committed such matters solely to either the Executive or the Legislative branch of Government — which is termed as 'the political question' by jurists in the United States — or because the court is entirely unsuited to deal with such D matters. Substantive relief is denied in such cases on the ground that the matters complained of are non-justiciable.

Even if a particular issue may be litigated because it is justiciable, a court may be entitled, in the exercise of its discretion, to refuse discretionary relief after taking into account all the circumstances of the case. The E grounds upon which declaratory relief may be refused are fairly well-settled, and include such matters as public interest. The following passage from the second edition of *Zamir on The Declaratory Judgment* read by Datuk Fong during argument, which deals with the relevance of public interest in the context of an action for a declaration is, in my judgment, of particular F assistance in the present case:

> In public law proceedings, this factor [meaning public interest] is likely to prove of particular importance in determining how discretion should be exercised because where the action challenged by the applicant is that of a public authority, the action can affect a large number of individuals. To grant the applicant relief could therefore, while benefiting him, prejudice G the public as a whole, and the court is entitled to have regard to the wider consequences when deciding whether or not to grant relief.
>
> Greater weight can obviously be given to the interests of the public where the applicant has delayed in seeking relief. However, even in cases where there has been no delay, the nature of the subject-matter of the application may make it inappropriate to grant declaratory relief. For example, H under the homeless persons' legislation, the courts will be slow to grant relief because that is an area where it is better for the local authorities, who have been entrusted by Parliament with the very difficult task of administering the Housing (Homeless Persons) Act 1977, to carry out that task without the intervention of the courts, except in cases where it is obvious that a local authority is acting unlawfully. In *R v Hillingdon London Borough Council, I ex p Pulhofer* [1986] AC 484, the House of Lords considered that the disruption that would be caused to the proper administration of the Act outweighed the benefit which would be achieved by individual applicants save in the exceptional case.

A similar approach was adopted by the House of Lords [in *R* v *Secretary of State for the Environment, ex p Nottinghamshire County Council* [1986] AC 240] in respect of attempts to obtain (inter alia) declaratory relief in relation to the guidance given by the Secretary of State in connection with the rate support grant. That guidance had been laid before the House of Commons and Lord Scarman stated:

> 'I cannot accept that it is constitutionally appropriate, save in very exceptional circumstances, for the courts to intervene on the grounds of unreasonableness to quash guidance given by the Secretary of State and by necessary implication approval of the House of Commons, the guidance being concerned with the limits of public expenditure by local authorities and the incidence of the tax burden as between tax payers and rate payers. Unless and until a statute provides otherwise, or it is established that the Secretary of State has abused his power, these are matters of political judgment for him and for the House of Commons. They are not for the judges of your Lordships' House in its judicial capacity.'

The demarcation between the two types of standing to sue for a declaration in public law proceedings was laid down by the Federal Court in *Tan Sri Hj Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 as follows (at p 179):

> The sensible approach in the matter of locus standi in injunctions and declarations would be that as a matter of jurisdiction, an assertion of an infringement of a contractual or a proprietary right, the commission of a tort, a statutory right or the breach of a statute which affects the plaintiff's interests substantially or where the plaintiff has some genuine interest in having his legal position declared, even though he could get no other relief, should suffice. When it comes however to the question of discretion on a consideration of the substantive application, it may well be proper in particular cases to refuse a remedy to persons who, though they may have standing as a matter of jurisdiction on the lines we have indicated, do not merit it, perhaps because, inter alia, others are more directly affected, or the plaintiff himself is fundamentally not.

In *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 at p 32 which is the leading authority on the subject under discussion, Abdul Hamid CJ (Malaya) (as he then was), who formed the majority said:

> With all due respect to the learned judge, my view is clear in that fundamentally where a statute creates a criminal offence by prescribing a penalty for the breach of it but not providing a civil remedy — the general rule is that no private individual can bring an action to enforce the criminal law, either by way of an injunction or by a declaration or by damages. I am inclined to the view that it should be left to the Attorney General to bring an action, either of his own motion or at the instance of a member of the public who 'relates' the facts to him: see *Gouriet's* case (*Gouriet v Union of Post Office Workers & Ors* [1978] AC 435).

In the present case, I am of opinion that the learned judge ought to have declined relief to the respondents on the ground that they lacked substantive locus standi. Whether they had threshold locus standi is a matter upon which we express no opinion since no application to have the action struck

A out was made by any of the appellants. Since Ekran, through its counsel complained before this court so vehemently upon the respondents' lack of threshold locus standi, one would have certainly expected such an application from his client. Why such an application was never attempted by Ekran, against whom the second declaration was specifically directed, was not satisfactorily explained. I will therefore assume, without deciding, that the respondents did have threshold locus standi to bring the action.

My reasons for concluding that the learned judge was wrong in holding that the respondents had substantive locus standi to receive the relief sought are as follows:

(1) It is quite clear that s 34A(8) of the EQA creates an offence, and renders criminally liable, any person who contravenes the provisions of the section. In the present context, assuming the respondents' contentions to hold true, Ekran, if it has failed to comply with the provisions of the EQA, would be open to criminal liability under s 34A. It would then be a matter for the Attorney General, as Public Prosecutor — to whom the Federal Constitution has committed the subject matter — to decide whether to institute criminal proceedings against Ekran. The case, at least in so far as the second declaration is concerned, therefore comes squarely within the proposition formulated by the first Chief Justice of Malaysia in *Government of Malaysia v Lim Kit Siang* in the passage earlier quoted. Relief ought therefore to have been denied on this ground.

(2) An examination of the factual matrix reveals that the respondents' have suffered no injury that warrants the grant of relief. In his judgment, the learned judge quite correctly recognized the basis of the respondents' complaint in respect of the project. It was that they will suffer deprivation of their livelihood and cultural heritage by reason of the project being implemented. This complaint certainly comes within the scope of the expression 'life' in art 5(1) of the Federal Constitution, for where there is deprivation of livelihood or one's way of life — that is to say, one's culture — there is deprivation of life itself: *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261.

However, in the present case, as earlier observed, the State of Sarawak will extinguish the respondents' rights in accordance with the provisions of *existing* written law obtaining in the state. The validity of that law has not been called into question. Neither has the adequacy or fairness of the measure by which the State of Sarawak proposes to compensate the respondents. These are matters that are not in issue here since, in this instance, life is being deprived in accordance with an *existing* and *valid* law, the requirements of art 5(1) are met. Accordingly, the respondents have suffered no injury which calls for a remedy.

Encik Gurdial Singh Nijar's response to this point is that his clients lost the right to be heard conferred by s 34A of the EQA and the Guidelines made thereunder, and that is a right which is not

capable of being compensated. With respect, I find this argument to be unsound for two reasons. A

First, because it depends for its accuracy upon the proposition that the EQA applies to the project. I have held that it does not. Therefore, no question of the alleged loss may arise.

Secondly, even assuming that there is merit in counsel's complaint, it is an eternal truth that all non-financial loss is difficult to quantify in monetary terms. Lawyers through the ages have wrestled with such thorny questions as: how much is a human limb worth? and how much is a man's reputation worth? Yet, courts make an assessment for these losses. The loss of a right to procedural fairness, even assuming it exists in this case, is no different. What must be borne in the forefront of one's mind is that the respondents' rights will be extinguished in accordance with a valid written law of Sarawak. That, in my judgment, is a sufficient answer to the complaints made by the respondents in the affidavit delivered in support of the summons. B C

It may be true, as En Gurdial Singh Nijar contends, that all administrative or other state action may be supported by indirectly linking it to some constitutional provision, no matter how tenuous the nexus. But it must be recognized that the principles of administrative law in this country, including the doctrine of procedural fairness, are formulated by reference to the omnipresent provisions of arts 5(1) and 8(1) of the Federal Constitution. The factual basis relied upon by the respondents and as disclosed in the affidavits filed on their behalf plainly brings the matters complained of well within the wide sweep of these two articles. There is, therefore, no room for the suggestion that a mere tenuous connection exists between the facts of the present instance and the relevant constitutional provisions. D E F

As I have observed, the respondents' right to life conferred by art 5(1) is being deprived in accordance with law. That in my view provides a complete answer to the respondents' case. Had the learned judge appreciated the true constitutional position governing the case, he would not have arrived at the conclusion at which he did. G

I pause to observe that the summons, as originally framed, only sought the second declaration. However, during argument, the respondent's case took on an entirely different complexion. The respondents turned their focus from an attack against Ekran as formulated in the second declaration to an attack upon the Amendment Order on the ground it sought to retrospectively deprive them of vested rights. Had the focus remained upon the case as first formulated, as it ought properly to have, the argument of the appellants in the second appeal — namely, that the respondents' rights are to be extinguished according to *existing* and *valid* written law — would no doubt have received the attention it deserved. H I

(3) The respondents sued in their own capacity. They did not seek to represent any or all of the 10,000 other natives whose livelihood and customary rights were equally affected by the project. There was no

averment in any of the affidavits filed in support of the summons to the effect that the respondents were championing the cause of the other natives who, so to speak, were fighting the cause from behind the hedge. Neither does it appear from the record provided that the case was fought on such a basis.

At the hearing in the court below, Datuk Fong submitted, quite properly, that as a substantial number of other persons whose rights were equally affected by the project were not before the court, the declarations sought ought not to be made because the harm complained of by the respondents was not peculiar or special to them. In this, he was supported by the statement of principle in *Tan Sri Hj Othman Saat v Mohamed bin Ismail* earlier quoted and by the following passage in the judgment (at p 40 of the report) in the judgment of Hashim Yeop A Sani SCJ (later CJ (Malaya)) in *Government of Malaysia v Lim Kit Siang*:

> What then is the proper law to apply to determine the locus standi of the respondent here? In my opinion, the principle in *Boyce v Paddington Borough Council* [1903] 1 Ch 109, as approved in *Gouriet v Union of Post Office Workers & Ors* [1978] AC 435 is still the law applicable in this country. Buckley J propounded the law as follows:
>
> > 'A plaintiff can sue without joining the Attorney General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with ... ; and secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.'
>
> In my view, we ought also to apply the common law principle enunciated in *Boyce* by virtue of s 3 of the Civil Law Act 1956.

Nevertheless, the learned judge — relying upon the following observation of Lord Radcliffe in *Ibeneweka v Egbuna* [1964] 1 WLR 219 at p 226 — held the respondents to have the requisite locus standi to receive the remedy claimed by them:

> However that may be, there has never been any unqualified rule of practice that forbids the making of a declaration even when some of the persons interested in the subject of the declaration are not before the court, see *London Passenger Transport Board v Moscrop* [1942] AC 332 at p 345 ('except in very special circumstances'), *New York Life Assurance v Public Trustee* [1924] 2 Ch 101. Where, as here, defendants have decided to make themselves the champions of the rights of those not represented and have fought the case on that basis, and where, as here, the trial judge takes the view that the interested parties not represented are in reality fighting the suit, so to say, from behind the hedge, there is, in their Lordships' opinion, no principle of law which disentitles the same judge from disposing of the case by making a declaration of title in the plaintiffs' favour.

The exceptional circumstances to which Lord Radcliffe referred in the foregoing passage are, for the reasons already stated earlier, absent in the present case. The learned judge was therefore wrong in

rejecting the argument advanced by Datuk Fong for denying standing in point of relief. A

(4) There is no dispute that declaratory judgments are in the discretion of the court. Although a plaintiff may establish facts which prima facie entitle him to relief, declaration may nevertheless be refused in the exercise of discretion. It is not a discretion exercisable at the mere B whim and fancy of an individual judge. It is a discretion that is to be exercised in accordance with settled practice and well-established principles that regulate the grant of the remedy. It is a discretion that is capable of correction by an appellate court.

Now, there are passages in the judgment of the learned judge C which show that he was conscious that the case involved questions of public and national interest. Yet, it does not appear that he took these matters into consideration. In particular, he failed to ask himself the vital question: are public and national interest served better by the grant or the refusal of the declarations sought by the respondents? In this context, I recall to mind the passage from the textbook by D Zamir earlier quoted which highlights the importance of public interest in such matters as the present instance.

The affidavit evidence filed on the respondents' behalf reveals that they were not against development in the national interest. They were merely concerned that, in respect of the project, there should be E compliance of written law. In the present instance, there was such compliance because Ekran, in relation to the project, did observe and act in accordance with the provisions of the Ordinance, which we hold to be the written law that is applicable to the facts of this case.

It is also to be noted that the learned judge merely found that F the justice of the case would be served by the grant of declaratory relief. But he did not, in the process of making such a finding, carry out any balancing exercise which is essential in cases that concern discretionary relief. He certainly took into account the interests of justice from the respondents' point of view. However, he does not appear to have taken into account the interests of justice from the G appellants' point of view as well. This omission fatally flaws the exercise of discretion. Justice is not meant only for the respondents. The appellants are equally entitled to have their share of it.

There was, in the circumstances of the present case, a failure on the part of the learned judge to take into account considerations that H were highly relevant to the exercise of discretion. The present case is accordingly one that squarely falls within the category of cases in which this court may intervene and exercise a discretion of its own.

Taking into account all the relevant facts and circumstances of the case, including the public and national interest, and the fact that I the remedy, if granted would cause greater harm than if denied, it is the considered view of this court that the declarations sought should be refused. The learned judge was clearly in error when he decided to grant them.

Summary of reasons

My reasons for deciding this appeal in the appellants' favour may be summarized as follows:

(1) The relevant statute that regulates the use of the environment in relation to the project is the Ordinance and not the EQA.

(2) Since the EQA does not apply, the respondents did not acquire any vested rights under it. The validity of the Amendment Order is therefore wholly irrelevant to the case and the first declaration ought not to have been granted.

(3) In any event, the respondents lacked substantive locus standi, and the relief sought should have been denied because:

(i) the respondents were, in substance, attempting to enforce a penal sanction. This is a matter entirely reserved by the Federal Constitution to the Attorney General of Malaysia in whom resides the unquestionable discretion whether or not to institute criminal proceedings;

(ii) the complaints advanced by the respondents amount to deprivation of their life under art 5(1) of the Federal Constitution. Since such deprivation is in accordance with law, the respondents have, on the totality of the evidence, suffered no injury. There is therefore no necessity for a remedy;

(iii) there were persons, apart from the respondents, who were adversely affected by the project. There was no special injury suffered by the respondents over and above the injury common to all others. The action commenced by the respondents was not representative in character and the other affected persons were not before the court; and

(iv) the judge did not take into account relevant considerations when deciding whether to grant or to refuse declaratory relief. In particular, he did not have sufficient regard to public interest. Additionally, he did not consider the interests of justice from the point of view of both the appellants and the respondents.

The result of the appeal

For the reasons given herein, the first, second and third appeals were allowed. The judgment of the learned judge was set aside and the respondents' originating summons was dismissed.

On the question of costs, En Gurdial Singh Nijar once again drew our attention to the fact that at some point in time, all concerned, including Ekran, had proceeded on the basis that the EQA applied to the project. This, he said, had prompted the respondents to institute their action. It was argued that in the peculiar circumstances of this case, an order for costs should not be made against the respondents.

I formed the view that there was merit in what respondents' counsel had to say on the matter of costs and suggested that there be no order as

to costs both here and in the court below. Acting with eminent fairness, counsel for the appellants in each appeal accepted this court's suggestion and informed us that they were not pressing for costs. This court therefore made an order that there be no order as to costs in the High Court and in this court. It was also ordered that the deposit paid into court by Ekran be refunded to it.

Before I conclude, I must express my appreciation to all counsel who appeared in the appeals. It was as a result of their meticulous research and full argument that this court was able to deliver its decision at the conclusion of arguments.

6 March 1997

Ahmad Fairuz JCA: I have had the advantage of reading the judgment of my learned brother Gopal Sri Ram JCA in draft and concur with the reasons and conclusions expressed by him therein.

14 June 1997

Mokhtar Sidin JCA: The respondents at the High Court sought and succeeded in getting the following orders/reliefs:

(i) a declaration that the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order 1995 is invalid; and

(ii) a declaration that before the first defendant ('the first appellant') carries out the prescribed activity, viz the construction of the Bakun Hydroelectric Project ('the project'), the first defendant has to comply with the Environmental Quality Act 1974 ('the EQA'), including s 34A of the EQA and/or the guidelines prescribed by the second defendant under s 34A of the EQA, and the regulation made thereunder.

Against that decision the appellants now appeal to this court. This court has given its decision earlier whereby the appeal be allowed. I am giving my reasons for allowing the appeal.

As can be seen from the record of appeal, there are three separate actions where the plaintiffs/respondents are the same in all the three actions and the reliefs/order sought in the three actions are the same. The appellants/defendants in Civil Appeal No W–01–165–1996 are Lembaga Sumber Asli dan Persekitaran (the Natural Resources and Environment Board) and Kerajaan Negeri Sarawak. In Civil Appeal No W–01–166–1996, the appellants/defendants are the Ketua Jabatan Jabatan Alam Sekitar and Kerajaan Malaysia. In Civil Appeal No W–02–341–1996, the appellant/defendant is Ekran Bhd.

At the High Court, it appears to me that all the three appeals were heard together and the learned trial judge gave a standard judgment for all the three actions. Taking the cue from the High Court, this court heard the three appeals simultaneously except the order of addressing the court by the appellants.

A Briefly, the facts of the three appeals are that the respondents are three of the natives of the land where the project is situated. The three respondents are three of approximately 10,000 natives who are in occupation of the land where the project is to be carried out. It is to be noted that nowhere in the caption nor in their originating summons and the affidavits is it stated that they are representing all the 10,000 natives or any segment B of the 10,000 natives. All they have stated is that they are natives from the longhouses in Long Bulan, Uma Daro and Batu Kalo respectively. By law, the ownership of the said land is vested in the State of Sarawak but the 10,000 natives are in occupation of the said land under customary rights where they and their ancestors have from time immemorial lived, cultivated, C hunted and collected the produce of the forests of the said land. It is common ground that the project would deprive the natives of those rights. But, as stated by the honourable Attorney General of the State of Sarawak, all the natives including the three respondents would be resettled and compensation would be given to them. As can be seen from the record of appeal and admitted by counsel for the respondents, in the present appeals D the respondents are not challenging the compensation or the resettlement.

I would like to handle the present appeal under three separate headings which, in my opinion, will dispose of the appeals, namely:

(a) which law is applicable;

E (b) whether the respondents have any cause of action; and

(c) locus standi.

(a) Which law is applicable

It is common ground that for the purpose of this appeal, there are two sets F of laws existing for environment. For Malaysia as a whole and in general, the EQA. At the same time, in Sarawak, there is another law in existence in respect of environment which is called the Natural Resources Ordinance 1949 ('the Ordinance'). The learned trial judge decided that the law applicable in the present appeal is the EQA and not the Ordinance because G the EQA is a Federal law. The Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 ('the 1987 Order') was made under the EQA and came into force on 1 April 1988. On 11 August 1994, the Sarawak Government gazetted the Natural Resources and Environmental (Prescribed Activities) Order 1994 ('the State Order').

H The 1987 Order was made under s 34A of the EQA whereby the Director General is empowered to make guidelines in respect of the report to be made which was to be submitted to the Director General. Amongst the guidelines issued by the Director General is that the report may be made available to the public if any person requested for the report. The complaint by the respondents is that the report was not given to the I respondents. It is the complaint of the respondents that they were not given the report of the project by the parties concerned before the project was approved. It was contended by the respondents that the defendants had contravened the 1987 Order for failure to follow the guidelines prescribed by the Director General purportedly made under the 1987

Order. On 27 March 1995, an amendment order was made to amend the 1987 Order ('the Amendment Order') and this was to take effect on 1 September 1994. On the same date, the State Order came into force.

The effect of the Amendment Order is that effective from 1 September 1994, the Order is not applicable to Sarawak and as such the guidelines issued by the Director General is inoperative in Sarawak. This is the offensive provision which forms the main complaint of the respondents. It is common ground that if the amendment is to take effect from 1 September 1994, it is applicable retrospectively. If that amendment is effective, then the requirement to make public the report as required by the guidelines is not applicable to any project in the State of Sarawak. The learned trial judge held that the Amendment Order is wholly invalid and made a declaration that it is invalid.

As I have stated earlier, there are two laws in existence in Sarawak at the same time, viz the EQA and the Ordinance. It must be remembered that our country is a Federation where the Federal Constitution is the supreme law of the land. Under the Federal System, it is to be noted that certain matters are left to the state to legislate. Sarawak and Sabah by virtue of the Malaysia Act have more matters reserved for them as compared to the other states. As can be seen from the lists in the Ninth Schedule, environment is a subject or item which is not found in any of the lists.

Under the Federal System, both the Federal Parliament and the State Legislatures have powers to legislate laws. For that purpose, the Federal Constitution provides for the distribution of legislative powers. Articles 73–77 provide as follows:

> 73 Extent of federal and State Laws
>
> In exercising the legislative powers conferred on it by this Constitution —
>
> (a) Parliament may make laws for the whole or any part of the Federation and laws having effect outside as well as within the Federation; and
>
> (b) the Legislature of a State may make laws for the whole or any part of that State.
>
> 74 Subject matter of federal and State Laws
>
> (1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).
>
> (2) *Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.*
>
> (3) The power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.
>
> (4) Where general as well as specific expressions are used in describing any of the matter enumerated in the Lists set out in the Ninth Schedule, the generality of the former shall not be taken to be limited by the latter.

A 75 ...

76 Power of Parliament to legislate for States in certain cases

(1) Parliament may make laws with respect to any matter enumerated in the State List, but only as follows, that is to say:

(a) for the purpose of implementing any treaty, agreement or convention between the Federation and any other country, or B any decision of an international organization of which the Federation is a member; or

(b) for the purpose of promoting uniformity of the laws of two or more States; or

(c) if so requested by the Legislative Assembly of any State.

(2) No law shall be made in pursuance of paragraph (a) of Clause (1) C with respect to any matters of Islamic law or the custom of the Malays or to any matter of native law or custom in the States of Sabah and Sarawak and no Bill for a law under that paragraph shall be introduced into either House of Parliament until the Government of any State concerned has been consulted.

(3) *Subject to Clause (4), a law made in pursuance of paragraph (b) or* D *paragraph (c) of Clause (1) shall not come into operation in any State until it has been adopted by a law made by the Legislature of that State, and shall then be deemed to be a State law and not a federal law,* and may accordingly be amended or repealed by a law made by that Legislature.

(4) Parliament may, for the purpose only of ensuring uniformity of law E and policy, make laws with respect to land tenure, the relations of landlord and tenant, registration of titles and deeds relating to land, transfer of land, mortgages, leases and charges in respect of land, easements and other rights and interests in land, compulsory acquisition of land, rating and valuation of land, and local government; and Clauses (1)(b) and (3) shall not apply to any law F relating to any such matter.

76A Power of Parliament to extend legislative powers of States

(1) It is hereby declared that the power of Parliament to make laws with respect to a matter enumerated in the Federal List includes power to authorize the Legislatures of the States or any of them, subject to such conditions or restrictions (if any) as Parliament G may impose, to make laws with respect to the whole or any part of that matter.

(2) Notwithstanding Article 75, a State law made under authority conferred by Act of Parliament as mentioned in Clause (1) may, if and to the extent that the Act so provides, amend or repeal (as regards the State in question) any federal law passed before that H Act.

(3) Any matter with respect to which the Legislature of a State is for the time being authorized by Act of Parliament to make laws shall for purposes of Articles 79, 80 and 82 be treated as regards the State in question as if it were a matter enumerated in the Concurrent List.

I 77 Residual power of legislation

The Legislature of a State shall have power to make laws with respect to any matter not enumerated in any of the Lists set out in the Ninth Schedule, not being a matter in respect of which Parliament has power to make laws. (Emphasis added.)

From the above articles, it is clear to me that the State Legislature may make laws with respect to matters enumerated in the State List or the Concurrent List as set out in the Ninth Schedule or where the matter is not enumerated in any of the lists in the Ninth Schedule. In addition to these, the States of Sabah and Sarawak are given additional lists as contained in List III which is supplement to the Concurrent List for States of Sabah and Sarawak. The relevant provisions giving this power is art 95B(1) where it provides:

> 95B Modifications for States of Sabah and Sarawak of distribution of legislative powers
>
> (1) In the case of the States of Sabah and Sarawak —
>
> (a) *the supplement to List II set out in the Ninth Schedule shall be deemed to form part of the State List, and the matters enumerated therein shall be deemed not to be included in the Federal List or Concurrent List*; and
>
> (b) the supplement to List III set out in the Ninth Schedule shall, subject to the State List, be deemed to form part of the Concurrent List, and the matters enumerated therein shall be deemed not to be included in the Federal List (but not so as to affect the construction of the State List, where it refers to the Federal List). (Emphasis added.)

It is interesting to note that environment is not included in any of the lists. I agree with what had been said by the Senior Federal Counsel that environment per se is an abstract thing. It is multi-dimensional so that it can be associated with anything surrounding human beings. The EQA by s 2 defines environment as follows:

> 'Environment' means physical factors of the surroundings of the human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics.

The Ordinance gave the same definition. My understanding of the word 'environment' is that it only exists when it affects something of physical nature, biological or social factors. Thus, when something is affected, the environment comes into play. Though the definition given by the EQA is rather vague, the word is a common usage now. As such, it is my opinion that the environment affected must be viewed with what it is related. In my view, in this respect, the power to legislate on environmental matters would necessarily depend on the specific activity to which the environmental matters relate. It appears to me that both the Federal Parliament and the State Legislature are competent to make laws in order to control the environmental impact on any activity of which the activity is identifiable with the lists given to them. As correctly pointed out by the Senior Federal Counsel, 'industries and regulation of industrial undertakings' is a Federal matter which is at List I para 8(1), and therefore Parliament can make environmental laws in respect of industries. Thus, the EQA came into being. On the other hand, when the environmental impact is on rivers, land and forest which are items contained in the State List, the State Legislature is competent to make laws in order to control all works on state land in respect of these items. Thus, the Sarawak Legislature passed the Ordinance in order to control all works on state land including the clearing

of forest and building dams across any river. It was conceded by the respondents' counsel that the impact on the environment in the present appeal was in respect of the rivers, forest and the land. Those are the things on which the respondents based their complaints.

As can be seen from the above, both the Parliament and the State Legislature are competent to make laws on environmental impact. On the face of it, there appears to be a conflict but in my view, that is not so. One has to look into the activity to which the environmental impact is aimed at. In my view, if the activity complained of is in the State List, then the Ordinance shall apply and if the activity complained of is in the Federal List, then the EQA shall apply. It appears to me that in the present appeal, the activities complained of are related to matters in the State List, thus the Ordinance shall apply.

In my view, upon realizing that the 1987 Order had encroached on the activities which are reserved for the state, the Minister made the amendment to clarify the Order that it shall not apply to the State of Sarawak because Sarawak has its own law in respect of those activities. The amendment, in my view, is more of a clarification since the activities in the present appeal are in respect of land, forest and water (which are in List II) and also the production, distribution and supply of water power and of electricity generated by water power (List IIIA).

In my view, the correct law to apply in the present appeal is the Ordinance. That being the case, there is no basis for the complaints by the respondents. As I understand it, the respondents' claim is that the appellants had not complied with the provision of s 34A of the EQA. As the EQA is not applicable in the present appeal, the complaints were groundless.

(b) Whether the respondents have any cause of action

Section 34A of the EQA empowers the Minister to make orders 'whereby he could prescribe any activity which may have significant environmental impact, as prescribed activity'. By virtue of this, the Minister made the 1987 Order. Subsequent to that, the Ordinance was amended to include s 11A to give the State of Sarawak similar powers and jurisdiction as in s 34A of the EQA. Section 34A reads as follows:

> 34A Report on impact on environment resulting from prescribed activities
> (1) The Minister, after consultation with the Council, may by order prescribe any activity which may have significant environmental impact as prescribed activity.
> (2) Any person intending to carry out any of the prescribed activities shall, before any approval for the carrying out of such activity is granted by the relevant approving authority, submit a report to the Director General. *The report shall be in accordance with the guidelines prescribed by the Director General and shall contain an assessment of the impact such activity* will have or is likely to have on the environment and the proposed measures that shall be undertaken to prevent, reduce or control the adverse impact on the environment.
> (3) If the Director General on examining the report and after making such inquiries as he considers necessary, is of the opinion that the report satisfies the requirements of sub-s (2) and that the measures

to be undertaken to prevent, reduce or control the adverse impact on the environment are adequate, he shall approve the report, with or without conditions attached thereto, and shall inform the person intending to carry out the prescribed activity and the relevant approving authorities accordingly.

(4) If the Director General, on examining the report and after making such inquiries as he considers necessary, is of the opinion that the report does not satisfy the requirements of subsection (2) or that the measures to be undertaken to prevent, reduce or control the adverse impact on the environment are inadequate, he shall not approve the report and shall give his reasons therefor and shall inform the person intending to carry out the prescribed activity and the relevant approving authorities accordingly:

Provided that where such report is not approved it shall not preclude such person from revising and resubmitting the revised report to the Director General for his approval.

(5) ...

(6) Any person intending to carry out a prescribed activity shall not carry out such activity until the report required under this section to be submitted to the Director General has been submitted and approved.

(7) If the Director General approves the report, the person carrying out the prescribed activity, in the course of carrying out such activity, shall provide sufficient proof that the conditions attached to the report (if any) are being complied with and that the proposed measures to be taken to prevent, reduce or control the adverse impact on the environment are being incorporated into the design, construction and operation of the prescribed activity.

(8) Any person who contravenes this section shall be guilty of an offence and shall be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a period not exceeding two years or to both and to a further fine of one thousand ringgit for every day that the offence is continued after a notice by the Director General requiring him to comply with the act specified therein has been served upon him.

Section 11A of the Ordinance reads as follows:

11A Reports on activities having impact on environment and natural resources

(1) The Board may, subject to such rules as may be made under section 18, by Order published in the Gazette, require any person undertaking the following activities —

(a) development of agricultural estates or plantation of an area exceeding the dimension specified in the said Order;

(b) clearing of forest areas for the establishment of agricultural estates or plantation;

(c) carrying out of logging operations in forest areas which have previously been logged or in respect whereof coupes have previously been declared to have been closed by the Director of Forests under the provisions of the Forests Ordinance;

(d) carrying out of any activity, including exploration for minerals, mining, farming, clearance of vegetation and setting up of agricultural estates in any area which in the opinion of the Board may pollute or in any way affect the sources of supply of water for human consumption;

(e) development of commercial, industrial and housing estates of an area exceeding the dimension specified in the said Order;
(f) extraction and removal of rock materials;
(g) activities which may cause pollution of inland waters of the State or endanger marine or aquatic life, organism or plants in inland waters, or pollution of the air, or erosion of the banks of any rivers, watercourses or the foreshores and fisheries; or
(h) any other activities which may injure, damage or have any adverse impact on the quality of the environment or the natural resources of the State;

to submit to the Board a report from such expert or authority and in such form as may be approved by the Board, on the impact of such activities on the natural resources and environment and any other particulars or information as may be required by the Board.

(2) Upon consideration of such report, and having regard to the standards and recommendations of the Council, and after making all necessary enquiries and seeking any further opinion as the Board may deem desirable or necessary, the Board may make such Order or directions as the Board is empowered to do under section 10 or any other provisions of this Ordinance or to undertake such works as may be deemed necessary under section 11.

(3) Nothing in this section shall authorize or deem to have authorized the Board or the Yang di-Pertua Negeri, in the exercise of the powers conferred under section 18, to make any Order, direction, guidelines, rules or regulations in regard to the environment affecting matters over which the State, by virtue of the provisions of the Federal Constitution, has no legislative authority.

As can be seen from the above, there are provisions under the EQA and the Ordinance for a report to be submitted before any activity which has an impact on the environment can be carried out. The report under the EQA must be approved by the Director General; and under the Ordinance, by the Board. As can be seen from the provisions of both these sections, there is no requirement for the report to be made public — which was what the respondents had been complaining about. It is the contention of the respondents that they have a right:

(1) to be supplied with copies of the environmental impact assessment ('the EIA') for the project prior to the approval of the EIA; and

(2) to make comments on the project which will be taken into consideration by the review panel prior to the approval of the EIA.

No such guideline or handbook exists under the Ordinance.

As I have ruled earlier for the purpose of this appeal that the Ordinance shall apply and since there is no requirement for the steps which gave rise to the complaints by the respondents in the Ordinance, the respondents have no cause of action in the present appeal.

Even assuming that the EQA, in particular s 34A applies, is there a requirement for the respondents to be supplied with copies of the EIA for the project prior to the approval of the EIA and for them to make comments? My perusal of s 34A of the EQA shows that it has no such requirements. I have to turn to the Handbook whether such rights exist. It was contended

by counsel for the respondents that the Handbook is the guidelines prescribed by the Director General which is provided for by s 34A(2) of the Act. Do the guidelines by the Director General have a force of law upon which the failure to supply will nullify the report or non-compliance of it will subject the offender to be penalized? My reading of s 34A does not point to that. Section 34A, in particular sub-s (8), makes it an offence for a person not submitting a report or not complying with the conditions imposed by the Director General or for carrying on the activity without the report being approved. Certainly, there is no provision under s 34A that the report must be supplied to the public and that failure to do so will nullify the whole activity. Subsection (8) makes it clear that if an activity is not carried out in accordance with the provisions of the other subsection, then the person carrying on that activity is subjected to a daily penalty until he complies with the provisions. That in my view does not nullify the activity as a whole.

The right to be given the assessment as contended by the respondents originated from cl 3.4.7 of the Handbook where the relevant passages state as follows:

> 3.4.7 The publication of detailed assessment reports
>
> In the normal course of events, *detailed assessment reports should be in the form that can be made available to the public* and it is the responsibility of the project initiator to provide *and distribute sufficient copies to meet the combined requirements of* the Review Panel, the approving authority, concerned environment related agencies and *the interested public*. The number of copies of the report to be made available for each purpose would have been specified in the terms of reference for the detailed assessment. *Maximum use should be made of economical duplicating processes to provide the required number of copies. A charge to cover duplicating and postage costs can be made for copies of the report requested by the public.*
>
> ...
>
> On submitting a detailed assessment report for review, *the project initiator must notify the Review Panel where the public may obtain copies of the report and the cost of each copy. The project initiator at the same time distributes copies of the detailed assessment report to the approving authority and to the appropriate environment related agencies for their consideration. As soon as it receives the report, the Secretariat to the Review Panel puts up public notices as it considers appropriate.* The notices state:
>
> (1) that a detailed assessment report has been received for review;
> (2) the nature and the location of the project;
> (3) *where copies of the report can be obtained, the cost of each copy*; and
> (4) *that any representation or comments by the public or concerned environment related agencies, on the report should be made in writing and forwarded to the Review Panel not more than forty-five (45) days of the notice.* (Emphasis added.)

My reading of those paragraphs clearly provides that an interested member of the public is entitled to the report if he applies for the report to be supplied to him on payment of a certain cost. He would not be given the

A report if he did not ask for it. There is no accrued right that the report must be distributed to the public without the public asking for it. From the evidence adduced which was by way of an affidavit, there was no evidence to show that any of the respondents had requested for the report to be supplied to them. All of them knew that according to the Handbook, before the project could commence, a detailed assessment report must be B given and approved by the appropriate authority. Thus, when the project was commenced, the respondents should have known that the reports had been submitted to the appropriate authority but they did not request for the report to be supplied to them with the stipulated conditions that they were willing to pay the costs of providing the report. The right in this case, C it appears to me, is only a conditional right which must be exercised by the person concerned: see *Kong Chung Siew & Ors v Ngui Kwong Yaw & Ors* [1992] 4 CLJ 2013. It appears that there is certainly no provision for the public to be supplied with the reports when there is no request for the reports. My reading of the provisions of the Handbook as a whole shows that it is not really a right but a privilege to have a copy of the report if the D person so requested: see *Director of Public Works v Ho Po Sang & Ors* [1961] 2 All ER 721.

The other point which is bothering me is whether the Handbook has a force of law. I had the opportunity of going through the Handbook and my reading of the various passages indicates to me that failure to comply E with the guidelines may render the report to be rejected by the Director General. On the other hand, the second paragraph of cl 3.4.7 clearly provides for a report not to be made public. Thus, non-compliance with the Handbook would not render the project to be nullified which will attract the order of a declaration.

F In my view, the respondents' complaint that they were not given the reports, even when they did not ask for it, is not a valid complaint for which an order for declaration could be granted. For these reasons, I am of the view that the respondents have no cause of action.

Though the learned judge had gone to great lengths to point out that G the amendment is null and void because of its retrospective effect, I am of the opinion that it does not matter whether the amendment is valid or not. As I had explained above, s 34A does not accord any right to the respondents that they be supplied with the report. The right will only operate as soon as the respondents have requested for them.

H *(c) Locus standi*

It was contended by the appellants that the respondents have no locus standi to bring this action. I agree with the learned trial judge that the best approach in the matter of locus standi is the proposition pronounced by the (then) Supreme Court in the case of *Tan Sri Hj Othman Saat v Mohamed bin* I *Ismail* [1982] 2 MLJ 177 where at p 179 Abdoolcader J (as he was then) said:

> The sensible approach in the matter of locus standi in injunctions and declarations would be that *as a matter of jurisdiction, an assertion of an infringement of a contractual or a proprietary right, the commission of a tort, a*

> *statutory right or the breach of a statute which affects the plaintiff's interests substantially or where the plaintiff has some genuine interest in having his legal position declared,* even though he could get no other relief, should suffice. When it comes however to the question of discretion on a consideration of the substantive application, it may well be proper in particular cases to refuse a remedy to persons who, though they may have standing as a matter of jurisdiction on the lines we have indicated, do not merit it, perhaps because, inter alia, others are more directly affected, or the plaintiff himself is fundamentally not. (Emphasis added.)

In my view, the onus is on the respondents to show to the court that there was an infringement of their contractual or proprietary right. In their claim, the respondents claimed they had been deprived of their accrued/vested rights to obtain a copy of the EIA, to be heard and make representations before the EIA was approved. This is the claim as found by the learned trial judge (at p 407 of his judgment). Do the respondents have such accrued/vested rights to obtain a copy of the EIA? I have earlier given my view in respect of the respondents' right to the report and I have found that the respondents have no such rights. I have given my reasons for doing so. Without these rights, the respondents have no claim against any of the appellants. In my view, the learned trial judge had erred in finding that the respondents have accrued/vested rights to claim for a declaration.

Further, the nature of the respondents' claim was that the appellants did not comply with s 34A of the Act. As I have stated earlier, that section provides penalty for non-compliance. It appears that the learned trial judge accepted what has been laid out in the case of the *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 when it was held as follows (at p 32):

> ... fundamentally where a statute creates a criminal offence by prescribing a penalty for the breach of it but not providing a civil remedy, the general rule is that no private individual can bring an action to enforce the criminal law, either by way of an injunction or by a declaration or by damages. It should be left to the Attorney General to bring an action either of his own motion or at the instance of a member of the public who relates the facts to him (per Abdul Hamid CJ (Malaya) (as he was then)).

Salleh Abas LP (as he was then) at p 20 said:

> In a public law litigation, the rule is that the Attorney General is the guardian of public interest. It is he who will enforce the performance of public duty and the compliance of public law. Thus when he sues, he is not required to show locus standi. On the other hand, any other person, however public spirited he may be, will not be able to commence such litigation, unless he has a locus standi, or in the absence of it, he has obtained the aid or consent of the Attorney General.

And further down at p 26, he said:

> In *Gouriet*'s case [*Gouriet v Union of Post Office Workers & Ors* [1977] 3 All ER 70; [1978] 1 QB 872], the House of Lords was confronted with a similar question. The House refused to allow the enforcement of criminal law by a civil court. Lord Diplock reminded the House of the importance of keeping a difference 'between private law and public law' meaning, in the

A context of that case, civil law and criminal law. In the words of Lord Diplock, 'it is the failure to recognize this distinction that has ... led to some confusion and unaccustomed degree of rhetoric in this case'. I accept this approach in view of the separation of the system of criminal justice from that of the civil justice system. It is unacceptable that criminal law should be enforced by means of civil proceedings for a declaration when the court's B power to grant that remedy is only at the discretion of the court. Jurisdiction of a criminal court is fixed and certain. The standard of proof in a criminal case is different from that required in a civil case and moreover the Attorney General is the guardian of public interest and as the Public Prosecutor, he, not the court, is in control of all prosecutions. How can a prosecution of this nature be done behind his back? These are some of the most serious C objections to the exercise by a civil court of its discretionary power relating to declaratory and injunctive remedies.

Thus it is clear to me that when s 34A creates an offence by prescribing a penalty for any breach committed under it and not providing a civil remedy, the general rule is that no private individual can bring an action D to enforce that provision, either by way of injunction or by a declaration or for damages. This is precisely what the respondents have done.

It is also accepted that there are two exceptions as pointed out by the learned judge. He stated at pp 14 and 15 as follows ([1996] 2 MLJ 388 at p 400):

E However, there can be two exceptions to this rule as pointed out by the learned Attorney General of Sarawak acting for the fourth and fifth defendants. This is expounded in the judgment of Lord Diplock in *Lonrho Ltd & Anor v Shell Petroleum Co Ltd & Anor (No 2)* [1982] AC 173 which is consistent with *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12. The exceptions are:

F 'The first is where upon the true construction of the Act, it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals as in the Factories Act and similar legislation ... .

The second exception is where the statute creates a public right (ie a right to be enjoyed by all those of Her Majesty's subjects who wish to G avail themselves of it) and a particular member of the public suffers what Brett J in *Benjamin v Storr* (1874) LR 9 CP 400 at p 407 described as "particular, direct and substantial" damaged "other and different from that which was common to all the rest of the public." '

The learned judge found that the first exception did not apply to the H respondents, with which I agree. As to the second exception, the learned trial judge found that it applies to the respondents and he gave his reasons for doing so.

With the greatest respect to the learned judge, I am of the opinion that the second exception too does not apply to the respondents. The I learned judge stated that the second exception applies because the 'operations of this project involve cutting down trees, diverting natural water flow and submerging large tracts of land with water'. As can be seen, all the people living in that area suffer the same fate. As such, the respondents' suffering and damage are not different from the damage and

suffering from the rest of the people there. To me, the respondents must satisfy the court that they suffered exceptional damage and suffering compared to the others there and not the public from other parts of Sarawak in particular or Malaysia in general. It is imperative to point out that the respondents' actions are not representative of the people in that area but are individual actions on their own. It appears to me that there is no evidence to show that the respondents had suffered special suffering and damage peculiar to them as required by the exception. As correctly pointed out by the learned Attorney General of the State of Sarawak, the government had compensated them. Whether the compensation is adequate or otherwise, the action taken by the respondents is not the correct remedy.

In my view, the learned judge had erred when he considered the damage done to the properties of the respondents. In their claim, the respondents sought the following order/relief:

> A declaration that before the first defendant carries out the prescribed activity, viz the construction of the Bakun Hydroelectric Project, the first defendant has to comply with the Environmental Quality Act 1974, including s 34A of the said Act and/or the guidelines prescribed by the second defendant under s 34A of the said Act, and the regulations made thereunder.

In my opinion, the exception must be viewed in the context of the prayer. There is nothing in the originating summons to show that the respondents had suffered any damage to entitle them to seek remedy or to bring the present appeal within the ambit of the second exception. As I have pointed out earlier, the only complaint made by the respondents was that they were not given or supplied with the EIA reports and that they were not given the opportunity to present their views. Nowhere was it pleaded that they have suffered damage as described by the learned judge.

In view of the above, I rule that the respondents had no locus standi to bring the present action seeking the orders/reliefs they were seeking.

For the above reasons, I am of the opinion that the learned judge had erred when he allowed the applications by the respondents for orders/reliefs that they sought. I will therefore allow the appeal by the appellants.

Appeal allowed.

Reported by Kevin Ooi